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IN THE

Supreme Court of the United States

No. 71-625

RICHMOND M. FLOWERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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I

INTRODUCTORY STATEMENT

The United States in its Brief In Opposition has attempted to submerge as well as eliminate important propositions that Petitioner has submitted to this Court for review by rephrasing the questions presented, restructuring the contentions of Petitioner and, in some instances, by completely ignoring certain critical issues. This reply is devoted to those areas which represent significant aspects of the above-described approach adopted by the Brief In Opposition and serves to even further accentuate the substantial nature of the questions raised by Petitioner Flowers.

II

RESPONSE TO ARGUMENT 1

The Government has endeavored to recast and thereby camouflage the thrust of Petitioner's contentions relating to the systematic and intentional exclusion of young people from the

grand jury drawn from the jury pool in 1968. Significantly, there is no refutation of law or fact relied upon by Petitioner. Rather, citing *United States* v. *Bryant*, 291 F. Supp. 542 (D. Maine 1968) and *United States* v. *Butera*, 420 F.2d 564 (1st Cir. 1970) there is advanced in the ignominious confines of a footnote (fn. 3, p.5 of Opposition) that the question is disposed of because both of those cases held it unobjectionable that a jury box was filled in 1968 from a jury pool filled in 1963.

Ingenuous dispatch of such a serious issue cannot suffice. The Brief in Opposition makes no reference to the fact that the jury pool in the instant case was also comprised of names, 50% of which were selected in 1959, thereby systematically and intentionally excluding from half the pool drawn from in 1968 all eligible persons in the Northern District of Alabama 30 years of age and under. Additionally, no allusion is made to the fact that in 1963 when the jury pool was reconstituted young people from the ages of 21 thru 25 were systematically and intentionally excluded from 50% of the pool by virtue of the inclusion of 7,000 stale names drawn in 1959.

Instead, as stated, it is urged that this Court refuse review of this serious issue based on the decisions of *Bryant* and *Butera, supra.* However, in these cases the defendants did not even allege, much less prove, what Petitioner has undeniably demonstrated to be intentional discriminatory practices. Revealingly, the *Bryant* court at page 549 states:

> In the present cases defendants *do not contend* that the Jury Commission *intentionally discriminated against or excluded from the jury pools any identifiable group.* Nor do they attack the key man system as such or *point to any specific defect either intentional or unintentional, in the methods employed by the Commission in selecting prospective jurors.* But they do take the position that the *percentage disparity* between representation of certain identifiable groups on the jury lists and the representation of these groups *in the population as a whole* requires the conclusion that the necessary result of the

selection methods used was unlawful discrimination. (Emphasis supplied).[1]

Quite the contrary, Petitioner has clearly contended and demonstrated that the jury selection system excluded an identifiable group from the jury pool drawn from in 1968. Petitioner has clearly contended and demonstrated that specific defects existed in the method employed in the jury selection system. Petitioner's contentions are much more compelling than the above-cited percentage disparity which was sufficient to shift the burden to the Government. Petitioner has demonstrated *total* and purposeful exclusion of an eligible identifiable group residing in the Northern District of Alabama in 1968, which unexplained, violates statutory and constitutional requirements.

The Government's argument on the contested language in the key man letter compels a response. The pivotal reliance on *Carter* v. *Jury Commission,* 396 U.S. 320 and *Turner* v. *Fouche,* 396 U.S. 346 (See p. 5 of Opposition) is glaringly insufficient in the instant situation. In those cases state *statutes* which *contained* "relevant qualifications for jurors" were construed. This Court in deciding that those statutes were not unconstitutional on their face found the qualifications included in those statutes to be time-tested, customary requirements of a great many states, the discriminatory application of which, if proven, could be effectively enjoined by federal courts, *Carter, supra* p. 525.

In the instant case, the situation is patently different. The letter sent to the jury nominators appended a unique subjective

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[1] It is to be noted that Judge Gignoux referred only in passing to staleness of names. This condition arose by virtue of the fact that the grand jury in question was drawn in March of 1968 from a jury pool constituted in January of 1963. This was accounted for, as the Jury Commissioner explained, by the fact, that although it was the policy to select pools every third or fourth year, it had been delayed in anticipation of the Jury Selection Act. (See footnote 3, page 544.) In *Butera, supra,* the Circuit Court was not presented with the issue of staleness nor was it considered. cf. In the instant case 50% of the names utilized in reconstituting the pool in 1963 reflected an age of some nine years when the 1963 jury pool was drawn from in 1968.

qualification entirely supplemental to the statutory qualifications, the discriminatory application of which could never be realistically isolated and prevented. *Rabinowitz* v. *United States,* 366 F.2d 34 (5th Cir. 1966), recognizing the evil inherent in these deviations, conclusively foreclosed encroachments of precisely *this* type thereby preserving the Congressionally intended integrity of Federal jury selection statutes.

III

RESPONSE TO ARGUMENT 2

Of paramount importance is the failure of the argument presented relating to Petitioner's first question to refute, deny or even comment upon the issue of the prosecutors' opening statements to the jury, the trial judge's failure to correct them, and his acquiescence therein. The United States merely asserts that "[t]he judge charged that if the jury believed the Government's evidence then as a matter of law the conduct affected interstate commerce." To substantiate this there is a total reliance on the proposition advanced by the majority opinion below that such statement is accurate because the judge stressed the words "if believed" in his instructions and the instructions as a whole met required standards.[2]

Three cases are submitted to this Court as controlling, *Nick* v. *United States,* 122 F.2d 660 (8th Cir. 1941), *cert. denied,* 314 U.S. 687; *Hulahan* v. *United States,* 214 F.2d 441 (8th Cir. 1954), *cert. denied,* 348 U.S. 856; *United States* v. *Green,* 246 F.2d 155 (7th Cir. 1957), *cert. denied,* 355 U.S. 871. (See p. 8 of Opposition). The reliance on these three cases simply serves to highlight and perpetuate the confusion that has occurred by virtue of the prosecutors' and trial court's misapplication of these precedents and the approval by the majority

[2]In footnote 5 (on page 7 of the Brief In Opposition) there is a failure to include very significant and prejudicial summarizing comments in the court's instructions which appear on page 9 and 10 of Flowers' Petition. Also, there is no response to the fact asserted by Petitioner that such instructions were repeated improperly two complete times in response to questions from the jury after they had begun deliberations.

opinion of the court below. In *Nick* the issue was whether the trial court was in error for improperly commenting on the evidence and for injecting an argumentative charge to the jury where the court stated:

> If the evidence of the witnesses outlining the *effect of stoppage of motion picture industry in St. Louis is to be believed and is believed by you,* the result, of course, is direct and substantial interference with or effect upon interstate commerce. (Emphasis supplied).

The Court of Appeals in passing on this challenged instruction rejected the criticism and stated:

> It is not for the jury to determine what is or what is not interstate commerce–that is a question of law. It is for the court to charge the jury that if certain facts covered by the evidence are shown then there is such interference.

The Eighth Circuit Court did not propose, much less sanction, this language as an appropriate instruction.

In *Hulahan* the same Circuit Court similarly rejected an attack upon instructions in a Hobbs Act case which included:

> I charge you, as a matter of law, that *if you believe* the testimony of the Government witnesses with reference to the federal jurisdictional element of interstate commerce involved in this case, *that is to say, the Government's testimony with reference to the bringing of various materials, commodities, and equipment, from out of state to the job sites in question in this federal judicial district,* then you are instructed that defendant's activities as shown by the Government's testimony, *if you believe the same did delay, obstruct and affect interstate commerce* as that language is used in the statutes under which these charges are brought. *That is to say, if you find the facts* to be as testified to by the Government's witnesses, the Court has determined as a matter of law that there has been substantial affect on interstate commerce shown here by the United States and that question is not for your determination. (Emphasis supplied).

In approving the instruction, the Circuit Court stated:

> This instruction amounts to nothing more than a statement that, if the jury believed the evidence of the Government relative to the interstate shipment of materials, commodities and equipment for use by the construction companies, the activities of Hulahan, if they constituted extortion or attempts or conspiracies to extort, would necessarily have affected interstate commerce within the meaning of the statute. We think it was for the court, and not the jury, to determine whether the Government's evidence, if believed, would bring the activities of the defendant within the statute and sustain federal jurisdiction. A similar instruction was challenged in *Nick* v. *United States, supra,* at page 673 of 122 F.2d. In that case the Court said:'* * * It is not for the jury to determine what is or what is not interstate commerce–that is a question of law. It is for the court to charge the jury that if certain facts covered by the evidence are shown then there is such interference.'

Again, the Circuit Court did not propose, much less sanction, this language as an appropriate instruction.

A critical transition which has given rise to the present confusion can be traced to the language and policy statement asserted in footnote 4, on page 5 of the "Brief for the United States in Opposition," *Hulahan* v. *United States* No. 294, October Term, 1954 as follows:

> The contention of petitioner that it is question of fact for the jury whether or not the conduct of petitioner has an 'effect on commerce' is contrary to the law. The question of whether and to what extent the proven extortions, threats to extort and conspiracies to extort affected the proven commerce is a question of law to be resolved by the court and not by the jury. An instruction similar to that given in this case was approved in *Nick* v. *United States,* 122 F.2d 660 (C.A. 8), certiorari denied, 314 U.S. 687, rehearing denied, 314 U.S. 715, 316 U.S. 710.

In *Green, supra,* the Seventh Circuit Court was called upon to review the following language of the charge in a Hobbs Act case which stated:

> [The charge] is a violation by force or threatened force, intimidation of workers or persons concerned in the construction of what is alleged to have been an interstate commerce highway. That is the charge and that is the matter which you must decide here. Now so far as this being an interstate commerce tramway or highway or whatever we may desire to call it, if you believe the testimony of the Government witnesses, it is unquestionably an interstate commerce highway.

The Court in approving that charge stated:

> It was clearly the function of the court to determine whether interstate commerce was affected and whether the court had jurisdiction under the Act. As stated in *Hulahan* v. *United States*, supra, 214 F.2d at page 446: 'We think it was for the court, and not the jury, to determine whether the Government's evidence, if believed, would bring the activities of the defendant within the statute and sustain federal jurisdiction.' See also *Nick* v. *U.S.*, 8 Cir., 122 F.2d 660, 673, * * *. A.L.R. 791.

Clearly, the Circuit Court did not propose, much less sanction, this language as an appropriate jury instruction.

As stressed at the outset, the Government has carefully avoided, as did the majority opinion in the Court of Appeals, the obviously purposeful statement of the Government's position in regard to Hobbs Act cases. At the opening of the trial in the instant case the comments of the prosecutors reflected a clear misapplication and expansion of the language of Circuit Court opinions referenced above and further reflected the Government policy as presented in the statement made by the United States in the *Hulahan* Opposition.

The Government ignores, as the Circuit Court majority opinion does, the far-reaching and detrimental procedures which Judge Rives found to be so fundamentally unfair that it gave rise to a dissenting opinion of some 26 pages devoted primarily to this subject. This can only be viewed as a reaction to practices which shock the conscience of English-speaking people who are devoted to the defense of the right to trial by jury.

IV

RESPONSE TO ARGUMENT 3

The myth and morass of whether as a matter of law a Circuit Court can determine what is or is not prejudicial publicity when removed from the scene, confronted with the troubled proclamations of a struggling trial judge, and hindered by the total absence of adequate steps to protect a jury's impartiality is in urgent need of clarification by this Court.

The high standards of this Court cannot, especially in this instance, condone the proposition that if the prejudicial publicity high water marks of *Sheppard* v. *Maxwell*, 384 U.S. 33 and *Silverthorne* v. *United States*, 400 F2d 627 (9th Cir. 1968) were not precisely achieved that disposes of this issue in this case. (See p. 9 of Opposition). Nor should this Court favorably regard a Circuit Court's action dismissing a claim of prejudicial publicity with the transpicuous reasoning that *Silverthorne*'s, headline, Don's Top Aid Takes Stand – Fail's To Deliver was clearly evaluative giving the impression of a defense having failed while Flowers' headlines, Prosecution Busy Tying Loose Ends and Flowers Defense Has Work Cut Out were examples of nonprejudicial typical reporting.

Petitioner respectfully urges that prejudicial publicity questions must not be decided, *in vacuo*, utilizing subjective judgments derived from the comparison of chimerical gradations of prejudiciality extracted from publicity in any one particular case with publicity from *Sheppard, supra, Silverthorne, supra,* or any other case. It would appear that the question for determination is whether or not trial publicity involved in a particular case *did* prejudicially affect the judgment of the jury involved.

In the instant case, the trial judge was both frustrated and deeply concerned about the probable effect of the publicity on the jury. Some of his reflections on the record reveal that he felt the publicity was prejudicial. In addition, he candidly admitted he did not know how to contend with the problem. Furthermore, even the Circuit Court gave eloquent testimony

to the fact that the methods he did employ during the trial were inadequate.

Both the Circuit Court and the Government completely ignore the contention that it is a matter of consequence that the trial judge summarily denied Petitioner's motion made after the verdict requesting in part the interrogation of jurors regarding prejudicial influence from publicity. Yet, in a trial in which the trial judge himself is concerned about prejudicial publicity what better judicial safeguard could exist, contributing to judicial economy on appeal and in no way prejudicial in itself because of its occurrence after the verdict? A resolution of this question would be of significant precedential value.

V

CONCLUSION

From inception to conclusion Petitioner's cause has been scarred by a succession of seriously prejudicial errors that highlight the manifest injustice permeating the disposition of this case. Orderly progression of the law and the preservation of vintage Constitutional prerogatives of an accused laboriously evolved over centuries of diligent jurisprudence urgently plead for this Court's review.

Respectfully submitted,

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